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PBot inside

Intellectual Ammunition

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Potshots

Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing had happened.

WINSTON CHURCHILL

There is no lower critter in the human race than those politicians, spending other people's money, who posture as philanthropic benefactors.

CHARLEY REESE

Bad laws are the worst sort of tyranny.

EDMUND BURKE

Government intrusion into health care probably causes as much pain and suffering as the disease itself.

DICK BOLAND

Timely medical advice: "For head cold: use an agonizer to spray the nose until it drops in your throat."

FROM AN 11-YEAR-OLD'S SCIENCE EXAM

A genius is a talented person who does his homework.

THOMAS EDISON

Quiet people are well able to look after themselves.

IRISH PROVERB

Asbestos Litigation Is Bankrupting America

By Joseph L. Bast

What does Bubble-Wrap®, the popular packing material that many kids (and more than a few adults) love to "pop," have to do with asbestos?

If you answered "nothing," you are right. If you said the company that produces Bubble-Wrap® should be liable for up to a billion dollars for alleged injuries caused by a product it never manufactured or used, then you are probably a plaintiffs' lawyer who stands to earn millions of dollars if your lawsuit, implausible though it may seem, is successful.

LAWSUIT ABUSE

Sealed Air Corporation acquired the Cryovac division of W.R. Grace in 1997. Grace had been the subject of asbestos-related lawsuits for years but was solvent at the time of the sale. It recently declared bankruptcy due to a flood of asbestos cases filed against it. Its Cryovac division never made or sold asbestos products, and neither has Sealed Air Corporation.

That has not stopped plaintiffs from claiming Grace made a fraudulent deal with Sealed Air Corporation to keep the assets from Cryovac hidden from asbestos judgments. Sealed Air Corporation may end up giving Grace more than a billion dollars to cover asbestos judgments.

Sealed Air's attorneys think they have a strong case, but they are being drawn into the treacherous waters of class-action lawsuit abuse, where lax judges, poorly informed juries, and greedy lawyers have turned asbestos litigation into a giant game of chance that has little to do with either science or justice.

Most of us recall the last "asbestos crisis," which resulted in governments, businesses, and schools spending billions of dollars "remediating" buildings by removing asbestos during the 1980s and 1990s. Less well-known is the ongoing litigation that has taken place since then.

More than 200,000 lawsuits are pending right now alleging a threat or potential threat to a person's health due to exposure to asbestos. Some 40,000 new suits are filed each year. Some experts predict that up to two million people may eventually file suit and payments could reach $100 billion.

Sixty-five percent of the funds generated by asbestos litigation, according to a RAND Corporation study, doesn't reach the people who are supposed to benefit, but finances instead a complex and adversarial system that re-

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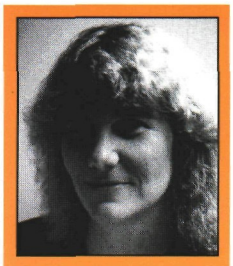

News from the Heartland

by Diane Carol Bast
Editor

CONGRATULATIONS AND BEST WISHES

In September, the National Conference of State Legislatures predicted the November elections would bring a greater than 25 percent turnover rate to state governing bodies across the country. Term limits and redistricting were among the causes cited for the higher-than-average (18 percent) turnover.

This issue of *Intellectual Ammunition* went to press on October 28. By the time it lands on your desk, many of you who are reading this letter will have won re-election. ***Congratulations!*** We hope you will continue to find *IA* a valuable resource as you begin your new term, and also that you'll let us know what we might change in order to become even more valuable to you. Please use the survey on the back page of this issue to let us know how we can help.

Some of you, of course, will not be returning to your state legislatures in January. We wish you much success in whatever new ventures you expect to take on ... and we want to be there for you, too, if you'll have us.

IA is automatically sent to all sitting state legislators. If we don't hear from those of you who won't be returning to office, this will be your last issue. But we'd be happy to keep you on the complimentary mailing list: Just let us know you want to continue receiving the magazine. Use the back page survey to provide us with your new mailing address. Even if your address hasn't changed, please be sure to return the survey with a checkmark in the box indicating you want to remain on the mailing list.

NEW COLUMNIST

We are pleased to welcome to *Intellectual Ammunition* a new team of Environment columnists: researchers and writers at PERC—The Center for Free Market Environmentalism, in Bozeman, Montana. In this issue's column, PERC Senior Associate Richard Stroup exposes the federal government's Superfund hazardous waste cleanup program as a breathtakingly expensive and ineffective way to protect the public health.

VISIT OUR REVAMPED WEB SITE!

In late October Heartland launched its revamped Web site at **www.heartland.org**, making Heartland's vast public policy resources even more accessible than ever.

www.heartland.org offers back issues of *School Reform News, Environment & Climate News, Health Care News, Intellectual Ammunition, Lawsuit Abuse Fortnightly*, and *The Heartlander*, as well as ***PolicyBot***—the largest collection of free-market research and commentary on public policy issues anywhere on the Web.

PolicyBot contains the complete texts of more than 10,500 reports and commentaries from the country's leading think tanks, including The Heritage Foundation, Cato Institute, and Manhattan Institute, as well as model legislation from the American Legislative Exchange Council (ALEC).

Heartland's Web site is the ideal place to go *first* to find background information and quotable sources for speeches, white papers, legal briefs, and talking points. You'll find quick links to policy experts and an extensive set of Web links to free-market think tanks and advocacy groups.

Quite simply, the *solution to every public policy problem* can be found on this site. Pay us a visit today, and be sure to bookmark the site for future reference: **www.heartland.org**.

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President: Joseph L. Bast ❖ **Publisher:** Nikki Saret ❖ **Editor:** Diane Carol Bast

Art Director: Kevin M. Fitzgerald ❖ **Graphic Design:** Jennifer Beranek

Contributing Editors: Editor Diane Carol Bast dbast@heartland.org; **Education** George A. Clowes clowes@heartland.org; **Environment** Jane Shaw shaw@perc.org; **Health Care** Twila Brase twila@cchc-mn.org; **Law** John Kramer jkramer@instituteforjustice.org; **Privatization** Lynne Kiesling lynnek@rppi.org; **Regulation** Susan E. Dudley sdudley@gmu.edu; **Taxes** Bill Ahern ahern@taxfoundation.org; **Technology** Bartlett D. Cleland bcleland@ipi.org; **Welfare** Michael B. Barkey mbarkey@compassionateconservative.cc

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continued from page 1

wards lawyers much more richly and consistently than victims. Congress has been repeatedly asked to remedy the situation, yet opposition from trial lawyers (who are major donors to the Democratic Party) has kept it from acting.

PLAY IT SAFE: SUE!

Exposure to asbestos was first recognized to be a threat to human health in the 1930s. Millions of workers were exposed to asbestos during the 1940s and 1950s, and when their symptoms became apparent between 20 and 40 years later, the lawsuits began. At first, sick workers sued the manufacturers of asbestos products, the most prominent of them being Johns-Manville. Johns-Manville filed for Chapter 11 bankruptcy protection in 1982; it was soon followed by the rest of the asbestos textile industry.

Some 90 percent of new asbestos cases are brought by individuals with no physical impairment. They file suits to be assured of getting benefits should the statute of limitations run out before they show symptoms of an asbestos-related disease.

The second wave of lawsuits was filed on behalf of workers exposed to asbestos-containing products in their workplaces, such as shipyards, refineries, railroads, and power plants. Then workers in the construction industry began to sue, alleging harm caused by drywall products, fireproofing sprays, and other asbestos-containing construction materials.

The latest wave of litigants are people who have medical proof of exposure to asbestos but do not suffer from disease as a result of that exposure. Due to the low level of their exposure, most probably never will. Nevertheless, they file suits to be assured of getting benefits should the statute of limitations run out before they show symptoms of an asbestos-related disease. Some 90 percent of new asbestos cases are brought by individuals with no physical impairment.

The latest wave of lawsuits is preventing the real victims of asbestos—those suffering from mesothelioma, a type of lung cancer found mostly in people exposed to asbestos—from having their day in court. Many widows and orphans are being deprived of any monetary compensation at all, just so people with better lawyers or more lenient judges can play the "litigation lottery" and win millions of dollars in undeserved awards.

Each new wave of litigation brings a new and larger circle of companies into the tort trap, including smaller and smaller businesses such as contractors, distributors, and the owners of premises where asbestos was found. Companies that acquired companies that manufactured or used products containing asbestos a half-century ago have also found themselves exposed to legal liabilities reaching millions and even billions of dollars. Companies several steps removed from any contact with asbestos, such as Sealed Air Corporation, are being named defendants in the lawsuits.

An asbestos suit being litigated in New Jersey originally named 250 companies as defendants. Some 200 companies settled out of court, agreeing to make payments that could reach $3 billion.

"Asbestos compensation through the tort system is broken—seriously, irreparably, and incontrovertibly," said law professor Michael Green of the University of Iowa before a Senate subcommittee in October 1999. "Everyone knows that the system is broken, judges know it, commentators know it, asbestos victims know it, their families know it, the experts who testify over and over and over again know it, and the lawyers who are litigating these cases know it."

JUSTICE, NOT PROFIT

What is the solution? Judges have a legal obligation, following the U.S. Supreme Court's decision in *Daubert v. Merrill-Dow*, to reject cases that fail to reach long-established legal standards of proof and liability. Jurors ought to vote against verdicts that give healthy alleged victims millions of dollars, to be paid for by workers (through lost jobs) and consumers (through higher prices).

Lawyers should remember they are first and foremost officers of the court and have an obligation to pursue justice—not simply make the biggest possible profit for themselves and their clients. Their greed has become a major barrier to finding a solution to the asbestos litigation disaster.

Congress, finally, should act to rein in lawsuit abuse, particularly as it is occurring in the asbestos arena, by taking asbestos cases out of the courts and creating an administrative or regulatory remedy. In 1999, bipartisan federal legislation was introduced that would have created such a program, to be called the Asbestos Resolution Corporation, but the bill died in committee following rigorous opposition from the plaintiffs' bar and victims' rights advocates.

Lax judges, poorly informed juries, and greedy lawyers have turned asbestos litigation into a giant game of chance that has little to do with either science or justice.

With the stakes so high, plaintiffs and defendants have negotiated a new legislative solution, H.R. 1283. Action in the House is expected, but the pro-plaintiffs' bar Senate is not expected to act on it. With every month that passes, more victims of exposure to asbestos die before they or their families receive even a single cent from the companies responsible for their plight.

Congress needs to move on reform legislation now, or risk facing the angry victims of asbestos and the asbestos *litigation* crisis in the next elections.

FOR MORE INFORMATION...

subscribe to The Heartland Institute's *Lawsuit Abuse Fortnightly*. Go to **www.heartland.org** and click on the Subscribe link. Back issues of the newsletter, in Adobe Acrobat's PDF format, are also available on the site at **www.heartland.org/Publications.cfm?pbId=7**.

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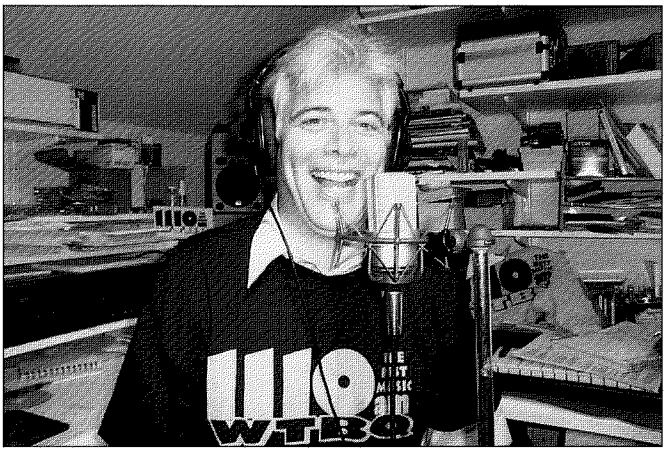

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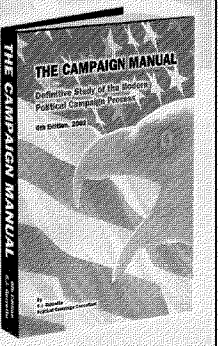

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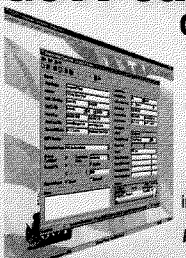

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Education

Lynn Harsh

Guest columnist Lynn Harsh is a former high school teacher and principal and currently executive director of the Evergreen Freedom Foundation in Olympia, Washington.
http://www.effwa.org

Vouchers: Neither Panacea Nor Poison

Question: *Would education vouchers solve all of America's education problems?*

Answer: No, but we can't "fix" education until we "fix" who makes the decisions about education. The people who make the decisions are those who control the money.

Vouchers move us toward marketplace competition and the right of individuals to make choices for themselves and their families. The freedom to enter and exit particular schools must become a right of education consumers, and creating options for students must become a right of educators and entrepreneurs, before schools will begin to reform themselves into more effective institutions of learning.

Question: *Would vouchers be a boon for private schools?*

Answer: Not necessarily. In a competitive education marketplace, vouchers would cover only the cost of delivering a quality education to students. There would be no windfall profits. Voucher programs operating today in Milwaukee and Cleveland cover less than the amount spent by typical private schools.

> *When the free market has been allowed to operate, choices spring up all over, often in unexpected and unusual places.*

Many private schools, particularly non-religious institutions, would quickly accept the vouchers. But vouchers would pose serious dilemmas for others. Admitting students with vouchers means accepting money with strings—strings that have some consequence to particular private institutions. The first "string" would likely be student testing, the second would be an open enrollment requirement.

Question: *Would vouchers undermine religious private schools?*

Answer: Religious schools are allowed to accept vouchers in Milwaukee and Cleveland and they have not been forced to abandon the religious elements of their curriculum. Of course, curriculum is not the only concern; other key elements of private schooling may be affected by vouchers. That is why it is important that voucher programs be designed differently from city to city and state to state. There is no single right voucher program, just as there is no single right answer to the question.

Some schools would probably accept public money even if it requires that they compromise their religious or academic standards. That is their choice to make. The parties responsible for balancing government requirements for vouchers against a private school's mission are the school's governing board and the school's patrons.

It is not government's job to keep private institutions from making unwise decisions or to protect them from competition. We have far too much of that "nanny nonsense" now. Should we allow government to continue running an education monopoly because some private schools will make what we consider to be bad decisions?

Comment: *Don't vouchers mean government control of private schools? Doesn't this mean, in the end, nobody will really have free-market choices?*

Response: History does not favor this prediction. Government schools replaced private schools during the nineteenth century by claiming a monopoly on public funding, not by tempting private schools with public funding and then controlling them. The way to restore private schools is to break the government school monopoly on public funding with vouchers.

When the free market has been allowed to operate in other fields, choices spring up all over, often in unusual and unexpected places. Highly motivated people in a free society find ways to meet their needs and the needs of others—even when that means bucking government and the status quo. Vouchers will inspire the same variety of options in education.

Question: *How can you expect parents to make wise choices about the schools their child attend when most of them don't even care enough to show up for parent-teacher conferences?*

Answer: The high quality and relatively low prices I pay for food are the results of a small percentage of consumers who take the time to be aggressive price shoppers. Grocery stores operate on a small profit margin and cannot afford to lose even 5 percent of their business, so they compete vigorously to provide what their shoppers want. The majority of us, therefore, benefit from the wise choices made by a very small number of people.

Likewise, schools cannot afford to lose even a small percentage of their revenue base. If the money follows the child to the school chosen by his or her parents, and leaves at the same time the child does, the school will respond to deficiencies immediately. This means many children will benefit from the active and conscientious involvement of a relatively small number of parents.

FOR MORE INFORMATION...

Zelman v. Simmons-Harris. The full text of the U.S. Supreme Court's July 2002 decision upholding the constitutionality of the Cleveland voucher program.

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Environment

Richard L. Stroup

Richard L. Stroup is Professor of Economics at Montana State University and a Senior Associate of PERC—The Center for Free Market Environmentalism, in Bozeman, Montana.
http://www.perc.org.

The Flap Over Superfund: Hopes Thwarted?

A few Democratic congressmen attempted to embarrass the Bush administration this summer by charging the Environmental Protection Agency is running out of money for hazardous waste cleanup under the Superfund program. Horrors!

The very suggestion sent EPA into a flurry, caused the agency to announce additional funding, and spurred assurances to Congress that no sites lack funding. "No work is being suspended," announced Christine Todd Whitman, EPA administrator.

The truth is, doing less would mean doing more—for public health and for the environment.

The Superfund program, enacted in 1980 to force cleanup of hazardous waste sites, has been a disaster—to use former President Bill Clinton's word for it. It is mired in legal suits, red tape, and unrealistic hazard assessments by EPA criteria.

> *[Superfund] cleanup was costing on average $26 million at each site. Indeed, researchers estimated that at the median site, it would cost $7 billion to avoid one cancer case!*

Perhaps the most egregious problem is that the rules written by EPA make many companies liable for cleanup, even when the company acted properly and caused no harm or realistic threat of harm. This liability has turned former factories into desolate, abandoned "brownfields" that no purchaser dares touch. The sites have become "the leper colony of the real estate industry," says attorney James DeLong.

Pressured by angry municipal officials, EPA created a brownfields loan fund to decontaminate those places ... but that fund, too, is said to be a bureaucratic nightmare.

Despite its obvious flaws, Superfund won't die. That is why suspending some of its work would be a good idea and why the congressmen hassling the agency were on the wrong track.

Since 1980, EPA has spent about $30 billion on Superfund. Although the agency collects funds from the targeted companies, the day-to-day operations of Superfund were greased by taxes on corporations, especially chemical and oil producers. The taxes were imposed on the grounds that these were "polluting" industries.

But the taxes were unfair because they were based on the kinds of products the companies made and on the companies' size—not on whether the companies polluted or handled waste improperly. The taxes undermined the "polluter pays" principle. In 1996, Congress quietly allowed the taxes to expire.

With less money flowing from the tap, EPA had to become more disciplined. It had to start setting priorities and begin working more effectively with the states. This change of direction was sorely needed. Why?

LITTLE RISK OF HARM

Most Superfund sites pose very little risk of harm. Although the term "hazardous" or "toxic" waste raises fears of "ticking timebombs" around the country, EPA's risk assessments go to tortured extremes to prove there might be dangers from most of the 1,400 or so sites on its list.

EPA often decides a site must be cleaned up if there is a one-in-a-million risk of one cancer being caused by the site. (About one in four persons die of cancer in any year, so increasing one's chances by one-in-a-million is a minuscule impact; building highway safety barriers would save many more lives). A respected study—funded by EPA itself—found that 140 out of 150 sites researched wouldn't raise any cancer risks at all if left as they were—yet cleanup was costing on average $26 million at each site. Indeed, the researchers estimated that at the median site, it would cost $7 billion to avoid one cancer case!

Supreme Court Justice Stephen Breyer has illustrated these extremes. As an appellate judge, he oversaw a case in which a waste dump had been cleaned up to the point where children could safely eat "small amounts of dirt daily for 70 days each year." At issue was whether $9.3 million more should be spent to allow them to "eat small amounts daily for 245 days per year." Breyer points out "there were no dirt-eating children playing in the area, for it was a swamp," and "future building seemed unlikely."

Better prioritizing the cleanup projects would certainly save resources—and probably save lives as well. Better priorities might halt or prevent the dredging of the Hudson River, which will bring to the surface chemicals (PCBs) that would more safely be left buried. Better priorities might stop the "cleanup" of the Edison, New Jersey manufacturing plant where the herbicide Agent Orange was made—where EPA wants to haul 150,000 cubic yards of dirt from one site to another—with all the danger that driving trucks and heavy equipment poses to workers.

Finally, better priorities would free up funds that could be used for real public health concerns.

When Congress ended the Superfund taxes, it did the right thing. Unfortunately, the flap over funding could force EPA to act as though nothing has changed.

FOR MORE INFORMATION...

Cleaning Up Brownfields. States, not the federal government, have taken the lead in cleaning up abandoned and polluted industrial states. EPA and other federal agencies should get out of the way, and let states handle problems within their own borders. (Competitive Enterprise Institute, July 2000)

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Health Care

Twila Brase

Public health nurse Twila Brase is president of Citizens' Council on Health Care.
http://www.cchconline.org

Feds Take Aim at Patient Choice

Federal officials propose to control the marketing and manufacture of pharmaceuticals. If they prevail, medication choices for all patients will be limited.

On October 3, 2002, the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS) published an 11-page proposal in the *Federal Register*. Following the proposed compliance guidance document would be voluntary for drug companies, but those not in compliance may face investigation. The public has until December 2, 2002 to comment on the proposal.

In effect, the guidance would act like an unofficial regulation on the pharmaceutical industry ... a threat in waiting.

The stated purpose of the guidance is to prevent and reduce fraud and abuse in federal health care programs. The actual goal is more sinister: restriction of free enterprise for cost-containment purposes.

The guidance would act like an unofficial regulation on the pharmaceutical industry ... a threat in waiting.

SELF-REGULATE ... OR ELSE

The guidance instructs drug companies to develop a code of conduct, designate a compliance officer, train employees, encourage complaint reporting, use audits to monitor compliance, discipline violators, and investigate misconduct. Keeping detailed internal reports and reporting probable fraud to the federal government are encouraged.

Specific risk areas for fraudulent behavior are described. Price and cost reporting to Medicare officials must not be misleading. This is a dubious requirement at best, given the various ways costs can be distributed across products. In addition, HHS requires the reported price to reflect any discounts given to anyone. Because Medicare is a substantial purchaser, this may eliminate discounts for everyone, including the poor.

Second, HHS reiterates the illegality of kickbacks, the use of inducements to gain access to Medicare reimbursement. The guidance clarifies that "arrangements that may increase the risk of overutilization, higher government program costs, inappropriate steering of Federal health care business, or unfair competition are particularly suspect." There is nothing here about the welfare of the patient. This is all about money.

The relationships between pharmaceutical manufacturers and purchasers, health care professionals, and sales agents are particularly worrisome to federal officials. No manufacturer should be allowed to offer free or below-market services to purchasers in connection with the sale of their products. This would eliminate a useful and cost-reducing mechanism of the free market. In addition, no purchaser, including high-volume buyers, should get special treatment. Translated, if Medicare doesn't get special treatment, no one does. And no one will.

HHS also discourages drug companies from encouraging physicians to switch patients from one medication to another. The fact that the new medication might be better for the patient is not addressed.

Do federal officials think doctors can be induced by greed or tricked by smooth-talking salesmen into risking patient lives and lifelong careers?

The manufacturer's use of sales agents, whether as employees or independent contractors, may be a violation of Medicare's anti-kickback statute, according to the guidance. Manufacturers who use them are to establish a system for tracking, compiling, and reviewing information about their every interaction. This scare tactic will discourage sales agents from visiting clinics or distributing free drug samples.

HHS also discourages manufacturers from using physicians to "act as" consultants, advisors, or researchers in connection with marketing and research activities. This is all very subjective. The manufacturer could depend on such individuals for valuable input. But HHS officials, determined to find fraud and cut costs, could disagree.

Finally, to tighten the noose, HHS warns against providing other remuneration (gifts, grants, meals, scholarships, etc.) to "physicians or others in a position to make or influence referrals." This statement is breathtakingly broad. Essentially, this is a gag order. Every physician is "in a position to influence" patient care.

A COUNTERPRODUCTIVE EFFORT

All patients will suffer if federal officials get their way.

- The cost of compliance with the guidance will raise all medication costs.
- Access to new medications will be severely restricted.
- Free drug samples will not be available for Medicare patients without drug coverage, for those with financial difficulties, for patients whose health plan formularies do not include a necessary drug, or for the insured without drug coverage.
- And, as pharmaceutical research declines, patients may also suffer from conditions that could have life-enhancing pharmacological solutions.

At a time when Congress is debating a prescription drug benefit for Medicare, federal officials have moved ahead on their own. If drug companies bow to HHS dictates, expect all patients, including senior citizens, to have fewer pharmaceutical choices regardless of what Congress decides.

FOR MORE INFORMATION...

Pharmaceutical Manufacturers Compliance Program Guidance. The draft guidance covers seven elements "widely recognized as fundamental to an effective compliance program," including effective training and education, internal monitoring and auditing, and standards enforcement. (Office of Inspector General, Department of Health and Human Services, October 2002)

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Law

Clint Bolick

Clint Bolick is vice president and national director of state chapters for the Institute for Justice.
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FTC Must Remove Barriers to Internet Commerce

The United States was created as one big "free trade zone" among the states; our Constitution was written to ensure no state would bar another's products. But, evidently, some states haven't gotten that message. Today, everything from contact lenses to caskets are blocked at state borders.

That is why the Federal Trade Commission (FTC) held hearings in October with the goal of removing state-issued tariffs and other anticompetitive regulations, especially those dealing with the Internet. These regulations hurt not only producers and consumers, but national unity and prosperity as well.

IMPORTANCE OF VOLUNTARY EXCHANGE

Everyone knows the Internet increases exponentially the ability of producers and consumers across the world to engage in voluntary exchange. It makes transactions more efficient, more personalized, and less costly while expanding consumer choice and allowing an infinite number of producers to market their goods and services directly to consumers.

Middlemen often go to their state government to protect their turf—to stop you from doing business with whomever you please.

So who could be against such vibrant trade?

Middlemen.

Why should you care?

Because middlemen often go to their state government to protect their turf—to stop *you* from doing business with whomever *you* please. States, eager to protect in-state industries and increase tax revenues, are all too often complicit allies with industries seeking shelter from competition.

Wine is a classic example. There are thousands of wineries in the U.S., most of which are small, family-run enterprises with small production. The number of wine wholesalers, by contrast, has shrunk markedly in recent years. Wholesalers, working with state legislators, have erected trade barriers in more than half the states forbidding the direct interstate sale and shipment of wine to consumers, often while allowing such shipments by in-state wineries. The Internet's vast potential for helping consumers obtain precisely the product they wish is obliterated.

The government's rationale is to protect against underage access to alcoholic beverages—which aside from government-sponsored sting operations is a nonexistent problem—and to collect tax revenue. But the real driving force is the multi-billion dollar wine wholesaler industry, which is determined to preserve its monopoly over wine sales at any cost.

This became clear after the Institute for Justice filed suit in New York on behalf of wineries and wine consumers to open up that market. Immediately, New York's four largest wholesalers, the liquor store association, and a transportation union all intervened to preserve the trade restrictions. Those entities have completely taken over the litigation from the state, demonstrating in the strongest possible way exactly whose interests are threatened by Internet commerce.

Fortunately, the principles of free trade embodied in our Constitution are more salient in the Internet era than ever before. A number of constitutional provisions provide powerful tools to those who wish to protect free trade over the Internet. Among them:

Commerce Clause. Absent explicit federal intervention, the commerce clause forbids protectionist state trade barriers. Where state regulations expressly discriminate against interstate trade, the state must demonstrate a compelling interest served in the least restrictive fashion possible. Where state regulations do not overtly discriminate but impose a burden on free trade, the courts will balance the state's interests against the national interest in freedom of commerce.

Privileges and Immunities Clause. States may not impose greater burdens on citizens of other states than they impose on their own citizens. One of the foremost privileges of national citizenship is freedom of enterprise. Where states discriminate against out-of-state producers, they must demonstrate that their regulations are closely related to an important state interest.

First Amendment. All Internet commerce involves speech, which enjoys special constitutional protection under the First Amendment. Even pure commercial speech, which proposes a commercial transaction, is protected.

PRESERVING LIBERTY

The Federal Trade Commission has an important role to play preserving economic liberty and consumer freedom—two pillars of a free society.

As the foremost watchdog over national free trade, it should investigate state trade barriers that separate producers and consumers, and it should weigh in on federal legislation that impacts free trade and in court cases that raise issues of free trade.

Never before has the role of the FTC been more important. The promise of our constitutional design—and the vast potential of the Internet to produce greater consumer freedom than ever before—demand its vigilance.

FOR MORE INFORMATION...

Uncorking Freedom: Challenging Protectionist Restraints on Direct Interstate Wine Shipments to Consumers. For the economic benefit of liquor wholesalers who control the distribution and sale of alcohol, 30 states have laws prohibiting the direct shipment of wine from out-of-state wineries to consumers. (Institute for Justice, 2000)

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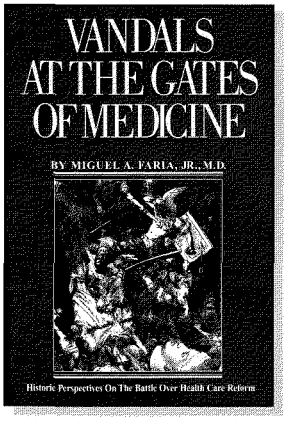
The Classics are Still Available



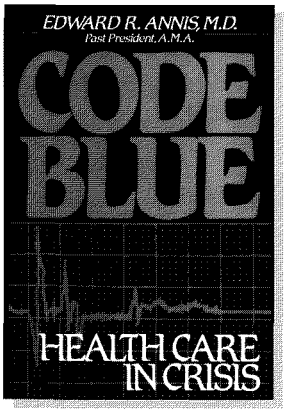
Vandals At The Gates of Medicine

Historic Perspectives on The Battle Over Health Care Reform

Miguel A. Faria, Jr., M.D.

Miguel A. Faria, Jr., M.D. provides compelling arguments that answers to the dilemma of health care reform reside on the pages of history. This fascinating book draws parallels between the past and the present, from a time when the fine line separating myth and history was blurred and indistinguishable to the clearly troubled present.

(403 pp., 1995, Illustrations, Bibliography, Index, ISBN: 0-9641077-0-8, $41.95)



Code Blue

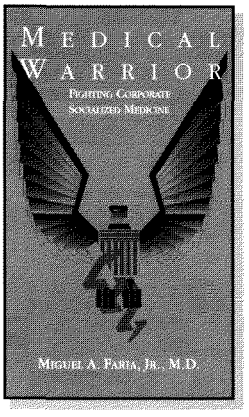
Health Care In Crisis

Edward R. Annis, M.D.

What the press doesn't tell the public—but Dr. Annis does—is that health care problems have a "Made [illegible]" shape. Code Blue solves the crisis with "minimal changes in our tax laws, Medisave accounts would empower the patient by breaking the tie between job and health insurance and even would allow the gradual phasing out of Medicare."

(278 pp., 1993, Index, ISBN: 0-89526-515-X, $21.95)

Sold Out!



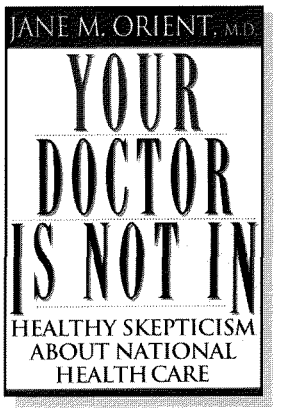
Medical Warrior

Fighting Corporate Socialized Medicine

Miguel A. Faria, Jr., M.D.

In this book of essays, Dr. Faria, argues that managed care and HMOs are not "free market" alternatives, but rather an unholy partnership of government and corporate interests seeking monopolistic government protection to eliminate competition while changing the ethics of medicine from a Hippocratic ethic to a false corporate morality. *Medical Warrior* offers workable solutions to restore medicine to its rightful place.

(207 pp., 1997, Selected Bibliography, Index, ISBN: 0-9641077-2-4, $23.95)

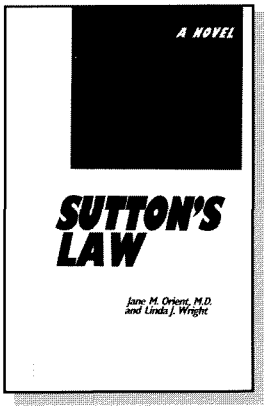


Your Doctor Is Not In

Jane M. Orient, M.D.

In this provocative book, a brilliant, committed physician, a leader in medicine argues for solutions to the crisis in medicine that are bold, thoughtful, and fundamentally opposed to those being widely touted today—including "managed care" systems. From her perspective, there is already too much government involvement in medicine, too much regulation, too much insurance—which is actually prepayment in disguise. These are the root causes of the accelerating rise in fees and costs, the neglect of patients, and stagnation in the science of medicine itself. This book is certain to add fresh energy to the debate over the quality and availability of medical care in America.

(276 pp., 1994, Index, ISBN: 0-517-59011-5, $23.00)



Sutton's Law

Jane M. Orient, M.D. and Linda J. Wright

Sutton's Law is a "frightening realistic novel about where managed care might very well lead us...A mix of medicine, mystery, murder, and intrigue with a little high finance, drugs, and romance—*Sutton's Law* ultimately is about greed and simple justice."

(299 pp., 1997, ISBN: 0-9641077-1-6, $21.95)

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Privatization

Adrian Moore

Adrian Moore is Vice President of Research at Reason Foundation, and Lynne Kiesling is Director of Economic Policy at Reason Foundation and Senior Lecturer of Economics at Northwestern University.
http://www.rppi.org

A Competition Process for the Federal Government

Federal agencies are facing a competition deadline: By the end of the fiscal year, 15 percent of federal jobs must be open to competition. A new Reason Foundation report offers 37 recommendations for overhauling the federal competition process, including requiring government employees who win a public/private competition to spin off from their former agency and creating a "competition corps" of highly trained competition managers.

PRESIDENT WANTS COMPETITIVE SOURCING

Competitive sourcing is the process for competing and outsourcing federal activities and a fundamental initiative in the President's Management Agenda (PMA), which aims to reform federal management practices to be performance-based and more responsive to customers (**http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf**). The PMA is the source of the 15 percent competition deadline.

The Office of Management and Budget is in the process of creating new guidance governing competitive sourcing by federal agencies and replacing Circular A-76 (**http://www.whitehouse.gov/omb/circulars/a076/a076.html**), the current policy governing the process of public/private competition. The new guidance will govern how federal agencies make decisions about providing services themselves or geting them from the private sector. It will also likely be seen to set a new benchmark for public/private competitions nationwide.

Federal agencies are facing a competition deadline: By the end of the fiscal year, 15 percent of federal jobs must be open to competition.

Many parties have been critical of the Circular A-76 process for some time, but OMB is acting to replace it following recent recommendations from the Commercial Activities Panel (CAP) (**http://www.gao.gov/a76panel/**), a group of federal stakeholders that Congress asked to examine the federal competition process. The CAP said the existing A-76 competitive sourcing process is neither transparent nor consistently applied, taking too much time and money to implement.

Reason teamed up with the Performance Institute to take 10 broad reform principles laid out by the CAP and turn them into concrete guidelines. The resulting report offers recommendations for making specific changes to the federal competitive sourcing process.

Reason and the Performance Institute consulted with government contracting officials, labor unions, private industry, and good-government organizations in formulating recommendations. At a public Town Hall forum in July 2002, Reason and the Performance Institute gathered more than 120 stakeholders to discuss various reforms. (Transcripts of the meeting are available at **http://www.rppi.org/ps299townhall.pdf**.) Managers and stakeholders from across the federal government were invited to submit commentary and recommendations in writing throughout the summer. The individuals working within the system were asked to offer their ideas for transparent processes and measurable outcomes.

That process generated 37 feasible ideas suggested often by the stakeholders. A few recommendations from the report that apply to public/private competitions at any level of government include:

- **Provide transparent and accurate data for measuring achievement:** Government agencies currently pay little attention to maintaining timely and accurate data during the life of a contract, leading to little transparency and no accountability. The winner must be held accountable for its performance and cost. Contract data—including personnel records, cost records, and workload data—must be constantly and accurately maintained, to enable the agency to evaluate the performance of the winner.
- **Allow agencies to keep savings:** The existing competitive sourcing process provides no positive incentive for agencies to undertake competitive sourcing, because it does not allow agencies to keep a substantial portion or all of the savings. Allowing agencies to share in the savings over the five-year period of performance of their contracts would also ensure agencies do not front-load cost savings in the first few years and offset savings in the later years.
- **Require measurable outcomes:** Accountability for and transparency of results are fundamental drivers of change. Agencies should be required to set measurable goals for competitive sourcing that should be bolstered by a complete business case to ensure the agency achieves its goals. Performance measures should focus on improved performance of programs in addition to cost savings. Data substantiating cost and performance achievements of winners of competitions (whether employee or private) should be maintained by each agency, and bolstered by the risk of early re-competition.

The Reason/Performance Institute report offers many more such recommendations in useful detail. Such thorough analyses stir creative thinking, push the envelope, and help decision-makers define the best approach to competitive sourcing.

FOR MORE INFORMATION...

Designing a Performance-Based Competitive Sourcing Process for the Federal Government. The package of recommendations developed here, while not embraced in their entirety by all stakeholders in the competitive sourcing process, nevertheless provides common-ground ideas that on the whole can benefit all stakeholders. (Reason Public Policy Institute and Performance Institute, October 2002)

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Regulation

Susan E. Dudley

Susan E. Dudley is a senior research fellow and deputy director of the Regulatory Studies Program at the Mercatus Center at George Mason University.
http://www.mercatus.org

NHTSA's War Against Safety

National Highway Traffic Safety Administration regulations require new vehicles starting in 2004 to be equipped with "smart" airbags that detect the size of passengers and adjust inflation force accordingly.

However, at least three major airbag suppliers have pulled their smart airbag technology off the market because it is unreliable and potentially hazardous. Automakers, who are making their 2004 models now, are forced to use available technology, even though, as *USA Today* reported in October, the smart airbags are "so dumb they could kill or injure children and fail to protect adults in crashes."

A review of the history of vehicle safety regulation shows this is not the first time NHTSA standards have put passengers at risk—suggesting it is regulators, not air bags, who need to be smarter.

Over the last several decades, increasingly complex regulations have not only hindered innovation and restricted consumer choice, but also subjected Americans to new hazards.

FROM SEAT BELTS TO PASSIVE RESTRAINTS

NHTSA passed the first seat belt regulation more than 30 years ago, requiring passenger cars to be equipped with a seat belt for all forward-facing seats. Over the years it added to the safety belt requirement, including mandating shoulder straps and lap belts.

Seat belts improved the likelihood that those who buckled them would survive a crash ... but they didn't do much for people who didn't buckle up in the first place.

So, in 1984, NHTSA introduced its infamous passive restraints standard, which manufacturers met with a shoulder strap that automatically engaged over the occupant. Consumers despised those belts. Worse, occupants wearing shoulder straps often neglected to buckle their lap belts, which left them even less safe than if they wore a lap belt alone.

In response to customer distaste for the shoulder straps, many automobile manufacturers began to offer air bags as a passive restraint alternative. Impressed with the air bag idea, NHTSA made air bags *mandatory* in 1993.

The problem was, instead of allowing manufacturers to design air bags to meet consumer demand, NHTSA's 1993 rules required that air bags meet certain tests. Those tests required manufacturers to design air bags to protect a 180-pound male who chose not to buckle his seat belt.

Of course, air bags designed to that standard deploy too forcefully to help the under 180-pound crowd. As we now know, these "standard" air bags have resulted in some tragic deaths.

WELL-MEANING ISN'T ENOUGH

This history is reminiscent of a classic children's story written in 1880, from which NHTSA could gain some insight.

"The Peterkin Papers," by Lucretia Hale, tells the story of a well-meaning, but not very intelligent, family. One day, Mrs. Peterkin was dismayed to discover she had mistakenly put salt instead of sugar in her morning coffee. It tasted awful. She called her family around to help her decide what to do.

First, they took the coffee to the local chemist who tried adding ammonia and various other chemicals, including a dash of arsenic, to the coffee. But each addition only made the coffee taste worse. They then proceeded to the neighborhood herbalist, who added more ingredients to improve the coffee, but again it only tasted worse.

In desperation, the Peterkin family turned to the Lady from Philadelphia, who was said to be very wise. "Why don't you dump it out and make a fresh cup of coffee?" the lady asked.

This is not the first time NHTSA standards have put passengers at risk—suggesting it is regulators, not air bags, who need to be smarter.

In its first passive restraint regulation in 1984, NHTSA put salt instead of sugar in its coffee. Since then, it has been imposing ever more complex and restrictive requirements in an attempt to fix that mistake.

"Smart" air bags that are supposed to determine the weights and sizes of passengers, decide whether they are wearing their seat belts, and deploy accordingly are yet another bad—and unrealistic—attempt by NHTSA to devise a single set of requirements that will protect the safety of all vehicle occupants under all conditions.

Unfortunately, regardless of how sophisticated NHTSA makes its tests, or how sophisticated manufacturers make air bags, this one-size-fits-all approach will not meet the preferences or protect the safety of all consumers under all conditions. Yet NHTSA will not even allow Americans the option of purchasing their vehicles with on-off switches, to say nothing of purchasing vehicles without the "smart" air bag.

The moral of this story is clear: It is time NHTSA dumped out the coffee and allowed manufacturers and consumers to pour a fresh cup.

FOR MORE INFORMATION...

CAFE Standards: Do They Work? Do They Kill? In this speech to The Heritage Foundation, Sam Kazman of the Competitive Enterprise Institute exposes the counterproductive nature of fuel economy standards, airbag mandates, and other "safety" regulations. (Heritage Foundation, February 2002)

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Taxes

Bill Ahern

Bill Ahern is communications director of the Tax Foundation.
http://www.taxfoundation.org

Baby-Boomers Profit at Gen-X's Expense

When young people purchase a first house, tax policy plays a central role in this milestone event, particularly after passage of the Tax Relief Act of 1997 (TRA'97).

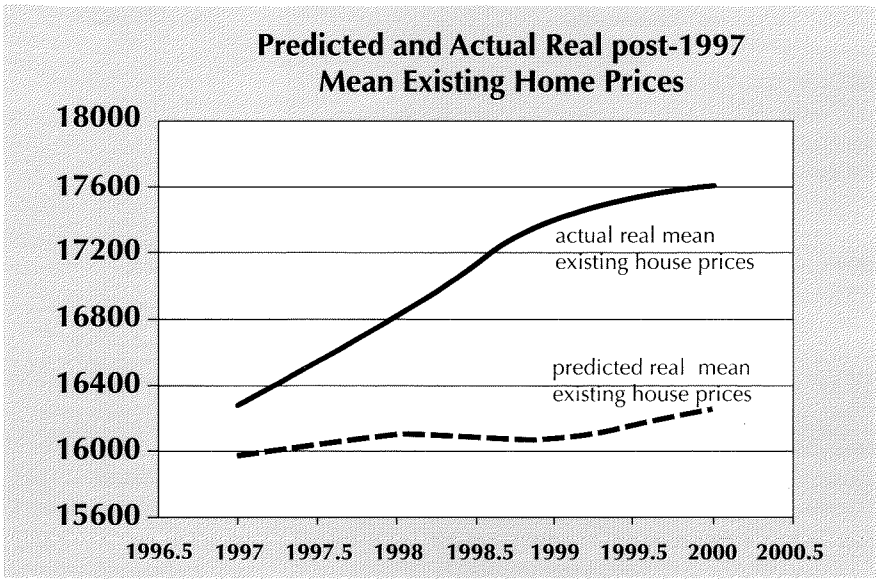
Before that law was enacted, U.S. tax law allowed people under 65 who sold their principal residence to avoid taxes on any profit—but only if they bought a replacement home of equal or greater value within two years. TRA'97 threw out the "more expensive home" requirement, replacing it with a high ceiling on the amount of gain that could be deducted: $250,000 for an individual, or $500,000 for a couple. To make the benefit even greater, it also reduced the maximum tax rate on capital gains from 28 to 20 percent.

Those provisions gave existing homeowners huge tax savings. For example, consider Chris and Sandra: a couple, both 50 years old, together earning $90,000. Suppose they sell their primary residence for a profit of $100,000 and move to a rental, or to a small town where housing is inexpensive, or to a second home they already own. In all these cases, they would have owed substantial taxes before 1997 ... but now they would pay no tax on the home sale because the profit was less than $500,000.

Thus, the Tax Relief Act of 1997 made housing investments dramatically more profitable, shifting demand from other investments to housing, and raising home prices. The main beneficiaries of this change are empty-nest baby-boomers, those homeowners who are not yet 65 but whose children are old enough to move away from home. (The home sales of older couples over 65 were always tax-exempt.) These baby-boomers can now downsize their homes without a tax penalty, and that makes their existing homes more valuable.

Younger families do not benefit from the new law nearly as much. They are typically shopping for relatively large houses to accommodate growing families, so the old "more expensive house" requirement wouldn't have bothered them. Thus, the change in how home sales are taxed will benefit them very little, at least in the near term, but it did raise the prices of the houses they're shopping for.

> *The Tax Relief Act of 1997 made housing investments dramatically more profitable, shifting demand from other investments to housing, and raising home prices.*



Real median existing home sale prices grew by an average of 2.7 percent a year between 1996 and 2001 compared to very little real growth between 1990 and 1996. Source: National Association of Home Builders (NAHB), Bureau of Labor Statistics
Note: deflated into real terms with CPI-U.

Thus, TRA'97 has essentially resulted in a significant transfer of wealth from young couples buying their first house, or upsizing their housing needs, to pre-retirement empty nesters.

Certainly, the new tax benefit is not the only factor driving up home prices—mortgage interest rates have been at historic lows. But even after taking mortgage rates and other factors into account, TRA'97 boosted existing home prices as much as 13.7 percent above what they would have sold for.

FOR MORE INFORMATION...

Affordable Housing: An Action Agenda for State Legislators. Three public policies—zoning, building codes, and property taxation—significantly affect the availability of affordable housing in a community. Reform of these policies, plus tenant ownership or management of public housing, is called for. (The Heartland Institute, 1991)

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State Standards for Accessible Technology

Bartlett D. Cleland

Bartlett Cleland is director of the IPI Center for Technology Freedom. Formerly he served as technology and policy counsel for Americans for Tax Reform, and earlier he was counsel to Senator John Ashcroft.
http://www.IPI.org

In 1998, President Bill Clinton signed into law amendments to the Rehabilitation Act, which addresses the need of people with disabilities for access to federally funded programs and services. The amendments strengthened Section 508 of the Act and require federal government agencies to "purchase, develop and use electronic and information technology products and services that are accessible to people with disabilities, including employees and members of the public."

As an example, the amendments require that word processors used by the federal government be compatible with "screen readers"—software that turns the written word into a spoken word. Photocopiers must be designed to have an attachment making all controls available to those with mobility challenges.

The law applies to all federal agencies when they develop, procure, maintain, or use electronic and information technology. The agencies must ensure this technology is accessible to employees and members of the public with disabilities to the extent it does not pose an "undue burden." Section 508 applies not only to federal agencies' presence on the Internet, but also to other means for disseminating information, including computers, software, and electronic office equipment.

State regulators may be well-intended, but the unintended consequences of their stricter rules can have very real ... and very harmful ... effects.

Importantly, the Act does not apply to private industry directly. But Section 508 clearly affects the technology industry. The federal government is the largest customer for industry in general, and the technology industry is no exception. When the federal customer makes decisions as to what it will and will not purchase, companies change their products to please the customer base. Accessibility requirements are no different.

STATES CONSIDER ACCESSIBILITY STANDARDS

Several states are also looking at the accessibility issue, and many are seeking to set accessibility standards for the products they buy. The potential for conflict with the federal standards is great.

Illinois has developed standards with which all state agencies must comply when developing Web sites and Internet applications. The standards are based on Section 508 and World Wide Web Consortium accessibility guidelines. Illinois has accepted a standard nearly identical to the federal government's ... but other states, like Texas, have gone much further.

In 1999, Texas adopted a standard that required state agencies to design Internet sites to conform with generally acceptable standards for Internet accessibility for people with disabilities. Texas requires that a Technology Access Clause be included in all contracts entered into by the state or state agencies that involve the acquisition of an automated information system. The required contract clause must read, "The vendor expressly acknowledges that state funds may not be expended in connection with the purchase of an automated information system unless that system meets certain statutory requirements relating to accessibility by persons with visual impairments."

Texas's mandatory contract clause essentially places the burden on the vendor to demonstrate its products comply with the law. The federal standard, by contrast, requires the government agencies to bear the burden of making sure the products they use are in compliance.

The nearly impossible challenge for the IT industry, then, is to design products that meet standards set by the federal government, 50 states, and the District of Columbia. Of course, industry will not—and indeed cannot and should not—create 50+ different versions of the same product. Given the influence of the federal government customer, it is likely most products will be designed with its standards in mind. State governments whose rules are more strict will limit their product selection.

THE VALUE OF UNIFORM STANDARDS

State regulators may be well-intended, but the unintended consequences of their stricter rules can have very real ... and very harmful ... effects. State government officials may chafe at the notion of following the federal government's lead, but in some cases that just makes sense.

Some may immediately object that "federalism" means states should be able to adopt their own standards. But of course, federalism is not at issue here. This is capitalism at work, not a central authority imposing its will on the states. When customers speak, industry listens ... and when an industry's largest customer speaks, products will be developed to suit that customer's needs.

Individuals with disabilities, governments at all levels, and the IT industry itself stand to benefit if the states coordinate their standards with those already in place at the federal level. If we want top-notch companies to produce high-quality, innovative products, then accessibility standards should be uniform from government contract to government contract.

FOR MORE INFORMATION...

Federal Policy Barriers to Assistive Technology. Describes the barriers in federal assistive technology policy to increasing the availability of and access to assistive technology devices and assistive technology services for people with disabilities. (National Council on Disability, May 2000)

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Welfare

Joe Barnett

Guest columnist Joe Barnett is a writer, researcher, and editor for the National Center for Policy Analysis.
http://www.ncpa.org

Better Off Welfare

Welfare rolls nationwide have fallen by more than 50 percent since welfare reform was enacted in 1996. The goal of reform was not simply to reduce the number of welfare cases, but to move families on welfare from dependency to independence through work.

Despite this success, there are two lingering questions: Have the easiest-to-employ women left welfare, leaving the "hardest" cases behind? And are the families who have left welfare better off? Research conducted since 1996 has provided some surprising answers:

- National surveys and state data show the women most at risk for long-term welfare receipt have left the welfare rolls at rates as fast as or faster than women who are much less at risk.
- In the states studied in depth, most of those leaving the welfare rolls have found employment, have increased their incomes relative to those who remain on welfare, and are gradually moving up the income ladder.

It is well established that the single mothers most at risk for lengthy welfare receipt and long-term welfare dependency are those who have never married, are poorly educated, are young (18 to 29 years old), have young children (under age 7), and are black or Hispanic. Yet these are the ones who have been leaving the welfare rolls at the fastest rates.

The welfare rolls could be reduced further if more states would adopt effective sanctions—swiftly withdrawing all cash benefits when recipients refuse to work.

CAN FURTHER PROGRESS BE MADE?

What proportion of long-term welfare recipients can be moved from welfare to work? We do not know, but in Wisconsin—which reduced its welfare rolls by more than 70 percent—only 2 percent of women who had been on the welfare rolls in 1990 were still receiving welfare or had returned to the rolls after some work experience by 1998.

During the booming economy of the late 1990s, welfare reform critics claimed the good economy was primarily responsible for the fall in welfare rolls. They predicted that if the good times ended, welfare rolls would rise. But a national analysis by former Congressional Budget Office Director June E. O'Neill and M. Anne Hill, her colleague, found that:

- The Temporary Assistance for Needy Families (TANF) program created in 1996 has accounted for more than half of the decline in welfare participation since then and for more than 60 percent of the rise in employment among single mothers.
- By contrast, the contribution of the booming economy of the late 1990s to these declines was relatively minor, accounting for less than 20 percent of either change.

IT'S UP TO THE STATES

The most significant factor in caseload reduction is the policies established by the states—specifically, whether or not the state has an effective sanctions policy. Effective sanctions withhold benefits from welfare recipients who refuse to work or to comply with other program requirements. The states that have been less successful have had ineffective sanctions, high benefit levels, and other counterproductive policies. Two of these states, New York and California, account for nearly a third of the remaining welfare caseload.

- In New York State, if welfare recipients refuse to comply with work requirements, their benefits are reduced (from $588 per month to $475 for a family of three), but they continue to receive food stamps, public housing, and other benefits. Recent figures show only 54 percent of adults perform assigned work.
- California offers high benefits and ineffective sanctions, using discretionary state funds and allowing working families to continue receiving benefits.

Without any changes in federal law, the states that have failed to reduce their welfare rolls by as much as the average could adopt more effective policies. The impact would be significant:

- If the 23 less-than-average states had done as well as the average state, more than 800,000 additional people would have left welfare.
- Instead of a 59 percent reduction in welfare rolls, the United States would have 66 percent fewer welfare recipients.

The welfare rolls could be reduced further if more states would adopt effective sanctions—swiftly withdrawing all cash benefits when recipients refuse to work. Requiring more welfare recipients to work, as President Bush and the House of Representatives have proposed, also would encourage more single mothers to make the transition to work.

Conversely, loosening time limits and work requirements, as the Senate Finance Committee has proposed, would encourage women to continue collecting welfare. The end result would be more families dependent on welfare for years to come.

FOR MORE INFORMATION...

Better Off Welfare. Congress is debating reauthorization of the 1996 welfare reform law. The Bush administration has proposed, and the U.S. House of Representatives in May passed, a reauthorization bill requiring states to put more of those on welfare to work or remove them from the rolls. (National Center for Policy Analysis, October 2002)

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Diversity Not Merely Skin Deep

by Jonathan Bean

The Illinois Board of Higher Education recently sought public comment on its campaign to promote faculty "diversity," which it equates with skin color or national origin. Most of the current and proposed "steps to increase minority faculty," however, are unnecessary and unconstitutional.

Faculty surveys show strong support for equal opportunity and "soft" affirmative action (reaching out to all prospective applicants, regardless of race). These same polls reveal strong opposition to faculty hiring preferences. Many college administrators and some faculty are biased in favor of minority candidates. Thus, the job will sometimes go to a minority candidate over an equally well-qualified nonminority. In short, minority applicants are treated equally well or better than nonminority applicants even without special programs.

Southern Illinois University-Carbondale

Department	Democrats	Republicans
History	22	1
English	14	0
Psychology	10	0
Political Science	9	1
Philosophy	8	1
Anthropology	7	0
Sociology	5	0
Economics	4	1
Geography	3	0
Total	**82**	**4**

STRICT SCRUTINY

It is the legal responsibility of schools to document past or present discrimination before instituting remedial programs. State universities in Illinois defend the Illinois Minority Graduate Incentive Program (IMGIP) and Illinois Consortium for Educational Opportunity Program (ICEOP) by invoking Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke* (1978). Justice Powell introduced racial diversity as one of many factors a school may consider in judging applicants on a case-by-case basis. Powell emphasized schools could not use race as the sole determinant of "diversity" nor use it in a wholesale manner to treat all members of a minority group differently from nonminorities. In other words, schools cannot reduce the idea of "diversity" to skin color.

In subsequent decisions, most notably *Croson* (1989) and *Adarand* (1995), the U.S. Supreme Court ruled that all racial preferences are subject to strict judicial scrutiny. States must show how their programs remedy past discrimination by particular state institutions; they may not resort to general claims of overcoming "societal discrimination." The courts have ruled that the following reasons are NOT compelling enough to justify racial discrimination by the state:

- achieving racial proportionalism
- providing minority role models
- overcoming general societal discrimination

A strong case could be made that the IMGIP and ICEOP scholarship programs are unconstitutional based on the above case law. Furthermore, employment discrimination from "targeted hiring" of minority candidates clearly violates Title VII of the Civil Rights Act.

Even more troubling, these minority scholarship programs require beneficiaries to "seek and accept" faculty positions within the State of Illinois. Do these candidates compete for jobs in open searches (legal) or do they receive jobs set aside for them (illegal)? Many state universities, including my own, have minority recruitment money to provide departments with an "incentive" to interview and hire minority faculty. During budgetary crises, when money is not available for competitive searches, will colleges conduct job searches open only to minorities?

OTHER FORMS OF "DIVERSITY"

Justice Powell's notion of diversity was not exclusively racial; he was concerned with allowing universities to consider many factors to achieve intellectual diversity. By focusing monomaniacally on race, universities have overlooked other groups that are severely underrepresented on college faculty, thus giving lie to their professed concern for "diversity." For example, faculty surveys highlight the near-absence of Republican and/or conservative faculty in the arts and humanities.

My research into the political affiliation of liberal arts faculty at Southern Illinois University Carbondale confirms this pattern: 105 Democrats versus 11 Republicans. A partial breakdown by department appears in the table.

True, there may be reasons other than employment discrimination for the underrepresentation of Republicans, just as there are reasons for the underrepresentation of certain minority groups. Yet, based on the diversity rationale, universities ought to be concerned with a "hostile environment" that produces so few Republican professors.

It is wrong for the state to define "diversity" by race and it is illegal for it to pursue policies that favor one group over another. A much more positive and effective approach would be to concentrate on improving the pre-collegiate education of minority students in Illinois. Only then will the state have a large pool of minority applicants able to compete on an equal basis with nonminorities.

Jonathan Bean is associate professor of history at Southern Illinois University Carbondale and author of Big Government and Affirmative Action: The Scandalous History of the Small Business Administration *(2001). This essay is derived from testimony he prepared for an October 2002 hearing before the Illinois Board of Higher Education's Study on Faculty Diversity.*

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The Right Tool for the Job?

An analysis of Tax Increment Financing

by the Developing Neighborhood Alternatives project

In November 2002, the Developing Neighborhood Alternatives project—a joint project of the Center for Economic Policy Analysis, Jewish Council on Urban Affairs, Heartland Institute, and Statewide Housing Action Coalition—released *The Right Tool for the Job?* an analysis of tax increment financing with case studies of Chicago-area TIF projects.

The complete report is available by mail for $20, pre-paid, from The Heartland Institute. The full text in Adobe Acrobat's PDF format is available for free at The Heartland Institute Web site, **www.heartland.org**

* * * * *

1. Tax increment financing (TIF) is seldom evaluated from a community perspective.

Tax increment financing (TIF) has become the most commonly used economic development tool in many cities throughout the United States, including Chicago. It is widely heralded as "one of the last remaining fiscal devices for repairing areas of the city afflicted by urban decay."[1] But TIF is also a controversial tool, accused of failing to create promised new jobs, subsidizing gentrification, and trampling community visions and private property rights.[2] If you are concerned about economic development, poverty, community renewal, or private property rights, you need to understand TIF.

TIF is a popular but controversial tool, accused of failing to create promised new jobs, subsidizing gentrification, and trampling community visions and private property rights.

Since TIF has been promoted and used as a community development tool, it is crucial to examine what happens to communities after a TIF district is instituted within their borders. However, to this point, there has been very little evaluation of how TIF affects a community. Generally, evaluations of TIF's impact on a community focus only on the claimed benefits of TIF—how many jobs will be brought to the community, how many new businesses will be available to residents, etc.

These developments are often taken out of the context of the community; the evaluations may say that 100 jobs were brought to a community, but they won't say if community residents had an opportunity to fill those jobs, or if they are newly created jobs or jobs that are simply shifted into the TIF district. Similarly, an evaluation might point to the number of household units TIF financing will help construct, but it will not evaluate whether community residents are more likely to benefit from or be displaced by that housing. Additionally, most existing analyses do not look at how the fabric of a community is affected by a TIF; that is to say, how many community relationships may be disrupted or severed due to businesses and individuals being displaced?

Our work provides the basis for public understanding and discussion of TIF from a community standpoint. We studied five TIF districts in Chicago to show how a community-centered analysis might be performed. The case studies included both qualitative data on neighborhood-wide changes and interviews with individuals and organizations affected by the TIF district. We also performed a policy analysis, examining TIF law to see what types of development TIF would best be able to facilitate, and what types it can only perform with great difficulty.

2. TIF favors large, new projects over smaller rehabs and expands the planning and policy powers of municipal governments.

Funding source: TIF needs to generate significantly higher property taxes to create the "increment" used to retire bonds and other expenses associated with the economic development plan. TIF revenue is calculated using the change in equalized assessed values (EAV) and the combined rates of all taxing bodies with claim to the area, including municipalities, school districts, counties, etc.

Justification for funding source: TIF can be used only in areas that would not experience an increase in property values "but for" the stimulus of TIF spending. If the "but for" clause does not hold, TIF simply diverts funds from school districts and other taxing bodies.

Access to funding source: TIF must be formally initiated by a municipality's planning department, and the final plan of the district and each subsequent expenditure must be passed by municipal ordinance.

Allowable expenditures: Most of the 12 categories of allowable expenditures relate to physical development. There are also allowances for spending on job training, day care, studies related to the district, and payments to other taxing bodies in lieu of taxes.

Powers allocated by TIF: Along with providing funds for the expenditures mentioned above, TIF expands the planning and police powers that the municipality holds within district boundaries, including eminent domain.

Implications: *Due to the need for increased property values, TIF favors large projects and new construction over smaller projects and rehabilitation. Definitions of blight tied to the "but for" clause tend to make municipalities bring organizations into the district, rather than developing existing organizations. Due to the legislative processes required for TIF, organizations and businesses with political and economic clout are the most likely to benefit from TIF. The extended powers granted by TIF allow the municipality and organizations with clout to impose their visions on communities.*

3. TIF has only a limited impact on economic development.

The five case studies produced for this report found:

Change in equalized assessed value (EAV): The increase in EAV of each

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TIF district since its formation was far greater than the increase for the city over the same time period.

Net change in number of businesses: Two of the three commercially-oriented TIF districts and their surrounding areas experienced a net loss in businesses. The third had a net increase, but at a rate slower than the city average. The two residentially oriented TIF districts and their surrounding areas saw net increases in number of businesses above the city average.

Net change in number of businesses by type: Most of the TIF districts and their surrounding areas saw a net increase in the number of retail, FIRE, and service establishments, while experiencing a net decrease in the number of construction and manufacturing businesses.

Net change in number of jobs: Each TIF district and surrounding area saw a net decrease in total jobs that was faster than the citywide decrease.

Net change in number of jobs by type: Four out of the five districts and their surrounding areas saw a net increase in the number of construction and manufacturing jobs. Three out of the five saw a net increase in the number of retail, FIRE, and service jobs.

Each TIF district studied and its surrounding area saw a net decrease in total jobs that was faster than the citywide decrease.

Change in residential property sales: The two residential TIF districts and their surrounding areas saw dramatic increases in the number of residential sales. One of the commercial districts and its surrounding area saw a similar increase, while the other two declined.

Change in housing sale prices: Data were mixed—in some instances, median housing prices increased faster than the citywide median, in other cases slower. In the two residential TIF districts, the sale prices of the TIF-subsidized housing were considerably higher than the citywide median.

Implications: *In these five districts, TIF did not significantly or consistently increase employment or residential property values.*

4. TIF creates winners and losers.

Interviews conducted for the Chicago-area case studies show TIF puts political and economic power in the hands of some interest groups.

Public participation in TIF process: In general, the larger and older a group was, the better they felt about their participation in the planning process. Smaller groups, or groups on the political outside, usually felt dissatisfied with the participatory process. Many existing local business owners also felt shut out of the process.

Interviewees, perceptions about who is receiving TIF benefits: Again, the more established an organization or business was, the better chance it had of accessing TIF benefits, which gave it a more positive view of the process. Smaller organizations and businesses that could not access the process thought the distribution of benefits was less fair. For example, a local optometrist could not get into a TIF-funded strip mall, while several national chains could. Organizations in the South Loop supporting single-room occupancy hotels had much more difficulty accessing the process than did the Near South Planning Board.

5. Recommendations.

Seek out alternatives to TIF. Communities seeking to spur economic growth should carefully consider alternative strategies before choosing TIF. Tax increment financing has not been proven to be effective at generating either jobs or new businesses. It has an ambiguous effect on housing markets, determined partly by how TIF districts are designed, but usually harms low-income renters and homeowners. Methods of encouraging economic development that are more compatible with the goals of stable and healthy communities and justice, and that allow community members to peaceably pursue their own visions of their community's future, ought to be pursued first.

Provide better information to the public about the effects of TIF. Until now, there has been little data collected and reported to the public about the impact of TIF in Chicago. This project has shown that such analysis is possible and enlightening. Additional analysis would be a simpler task for government bodies who have more resources at their disposal than the groups in this project.

Make TIF decision-making procedures more inclusive and fair. Much of the damage done by TIF occurs because public access is limited and comes too late in the process to affect key decisions. Decisions involving TIF should be made openly and transparently. Municipalities receive considerable powers through TIF, so special review procedures are justified to ensure these powers are used well.

Municipalities must ensure that community members have strong oversight of TIF, including watching over the early stages where eligibility studies and redevelopment plans are created. This oversight should include giving community members the opportunity to say whether they want TIF in the first place. TIF dollars are coming directly from the community, so decision-making about how to spend those dollars should come from the same source.

Distribute the benefits of TIF more fairly. The fact that TIF creates winners and losers, rather than being a "win-win" process, is a major problem that can be addressed only partially by reforms. In some cases, "distributing the benefits of TIF more fairly" may mean not using TIF at all, but finding alternate ways of spending the money that would have gone to fund TIF. Communities are better off focusing on "win-win" strategies that create widespread benefits by removing obstacles to work, investment, and communication. This development would reflect and enhance the existing character of the neighborhood.

In cases where TIF is used, the potential for abuse or unfairness in a TIF district could be minimized if companies that benefit from redevelopment agreements were required to hire locally and pay wages and benefits sufficient to allow community residents to stay in their community, if they so choose. Local business owners in the community should have a right to participate in plans that might adversely affect them by raising rents or subsidizing new competitors.

Notes

[1] Editorial, "Daley Endangers the TIF Tool," *Chicago Tribune*, July 27, 1997. See also Grace Bazylewski, "In Defense of TIF District—A South Suburban Municipal Perspective," *Illinois Municipal Review,* April 1998, pp. 15-16.

[2] See Richard F. Dye, "A Comparative Analysis of Tax Increment Financing in Northeastern Illinois," *Journal of Urban Economics,* March 2000; Civic Federation, "Assessing the Impact of Tax Increment Financing in Northeastern Illinois," March 1997; Neighborhood Capital Budget Group, "Chicago TIF Encyclopedia," 1999; Michael Dardia, "Subsidizing Redevelopment in California," Public Policy Institute of California, 1998.

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West Nile Wakeup Bites

By Hugo Gurdon

It became common in Washington's parks during the summer to see mothers rubbing their children's arms, faces, and legs with wipes pulled from brightly colored plastic containers.

Three years ago, these would have been saturated with anti-bacterial cleanser, which had become de rigueur among parents who wanted squeaky-clean kids. But in the summer of 2002, the damp squares of fabric were more likely to be soaked with bug repellent.

This year, mothers were suddenly less worried that little Johnny's hands might be grubby than that he could get West Nile Virus. The United States is in the midst of its worst-ever outbreak of the disease. Even though the clouds of mosquitoes have gone, along with the summer heat, the death toll continues to rise.

However regrettable to families and friends, a couple hundred deaths do not amount to a major public health calamity in a population of 280 million people. But it's equally innumerate to console oneself with little factoids, such as that a person is statistically more likely to be killed by a falling bale of hay than by the mosquito-borne virus. For most of us, who never get near a bale of hay, the chance of that bizarre agricultural demise is zero. But almost all of us get mosquito bites. They are the bane of barbecue season from the Rio Grande to the 49th Parallel.

Actually, they are the bane of barbecues even further north. The first victim to have contracted West Nile Virus in Canada has died, and there have been more than 20 cases in Ontario and Quebec. The disease has also spread west to California, so it is continent-wide and here to stay.

[West Nile Virus is] here to stay unless ... American society shakes off its romantic environmentalist reverie and ends its antipathetic fixation on pesticides.

FIXATED ON PESTICIDES

Here to stay unless, that is, American society shakes off its romantic environmentalist reverie and ends its antipathetic fixation on pesticides. Like a dog with its favorite bone, we refuse to let go.

Polls suggest that three-quarters of Americans are "extremely or very concerned" about pesticide pollution. With great callousness, the West has even bullied African nations to stop safe and effective use of DDT, even though between 1 million and 3 million people die of malaria on that continent every year.

Notwithstanding a wealth of compelling scientific evidence to the contrary, we have remained convinced, ever since Rachel Carson's told-us-so in *Silent Spring* (1962), that we're surrounded by synthetic killers.

Well yes, they are synthetic killers—but the things they kill are insects, not humans. The U.S. Environmental Protection Agency, which cannot plausibly be regarded as underestimating environmental risk, sets safety standards so cautiously that a 3-year-old child could without harm stand for 20 minutes enveloped in a cloud of the mosquito killer, malathion, being sprayed at legal concentrations from a fogger truck.

Yet the manufacturer, American Cyanamid Corp., has decided not to go to the trouble and expense of re-registering malathion, as EPA regulations now require, and has instead sold the product rights to a Danish firm that may or may not choose to jump through the U.S. regulatory hoops. If not, an effective weapon against disease vectors might soon be lost. Three cheers for healthy environmentalism.

SAFE TO SPRAY

Parents, who do not mind the use of chemicals at safe levels to protect children in swimming pools, can have no well-founded objection to the safe elimination of mosquitoes through use of pesticides. It's not that West Nile Virus has created an emergency, but there is no environmental health reason not to spray.

EPA and the World Cancer Research Fund are among a wide range of authorities that acknowledge pesticides pose a vanishingly small health risk. You're much, much likelier to get cancer from supposedly healthy foods such as celery, or from your morning cup of coffee, than you are from environmental pesticides.

In his myth-shattering book, *The Skeptical Environmentalist,* Bjorn Lomborg calculated that the formaldehyde level in a typical house makes staying home for 14 hours 260 times more carcinogenic than consuming the average intake of ETU, the most toxic pesticide in use today.

It should not take a new disease like West Nile to prompt mosquito eradication—we should get rid of them anyway because they're the most irritating creatures in creation. It would be equally wonderful to eradicate the myths about pesticides—but they've been sprayed with facts so often they've become immune.

Hugo Gurdon is the Warren Brookes Journalism Fellow at the Competitive Enterprise Institute.

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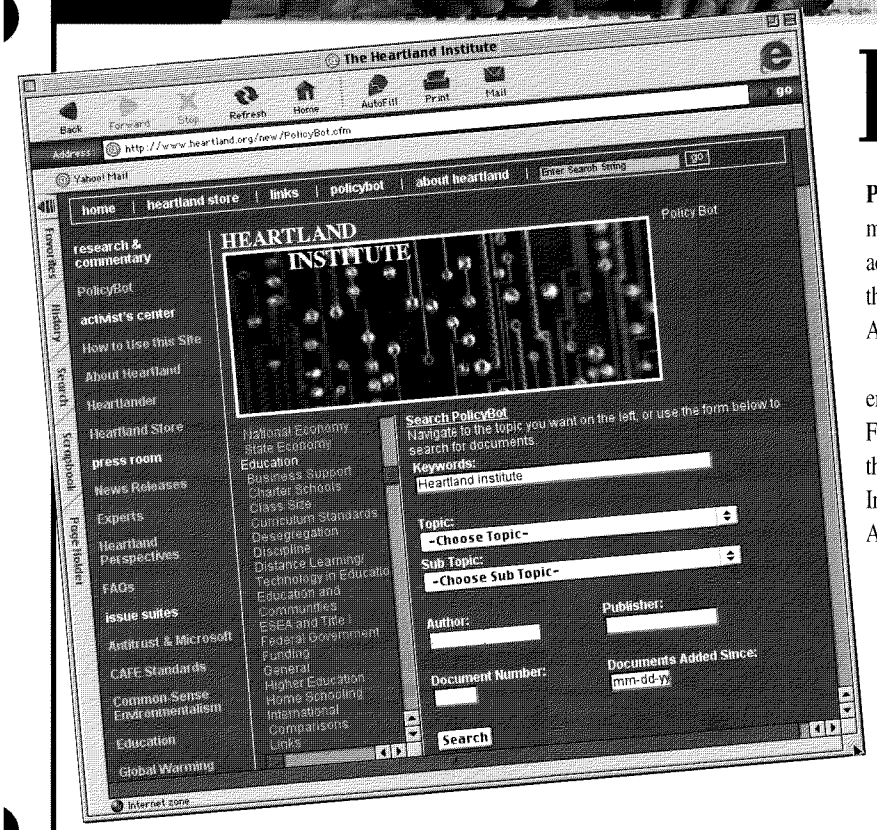

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